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No. 89-1028

In The Supreme Court of the United States October Term, 1990

CSX TRANSPORTATION, INC.,
Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

In its initial brief, Petitioner CSX Transportation, Inc. ("CSXT") demonstrated that the holding of the Court of Appeals is in error. The court's ruling that the immunity conferred by ICA § 11341(a) does not reach labor contract obligations is contrary to the express language of the statute, its legislative history, and the public policies underlying our national rail transportation legislation since the Transportation Act of 1920. The decision below is inconsistent with decisions of this Court, principally *Schwabacher* v. *United States*, 334 U.S. 182 (1948), and numerous lower federal court decisions. *See* CSXT Brief at 26-27 and n.31.

The brief submitted by the Union Respondents is noteworthy in several respects:

First, the Union Respondents, like the Court of Appeals below,[1] virtually ignore this Court's controlling and instructive prior decisions. Their attempt to distinguish *Schwabacher* is relegated to a single footnote. Union Resp. Brief at 43 n.57. They fail to acknowledge this Court's recognition in *United States* v. *Lowden*, 308 U.S. 225 (1939), that contractual seniority rights will inevitably be lost in the implementation of an ICC-approved rail consolidation. They do not even cite, much less discuss, the four-justice concurring opinion in *ICC* v. *Brotherhood of Loc. Eng'rs*, 482 U.S. 270, 287 (1987) ("*BLE*").

Second, while the Union Respondents agree that the language employed by Congress is the most important indicator of Congress' purpose (Union Resp. Brief at 24), they then ignore the breadth of the immunity language that Congress has repeatedly used since the Transportation Act of 1920. They do not support the Court of Appeals' view that the absence of the word "contracts" in the ICA immunity section is significant. Pet. App. 12a.[2]

Instead, the Unions suggest, contrary to the explicit findings of the ICC in the instant cases and prior ICC decisions defining the scope of the authority conferred on consolidating rail carriers under ICA § 11343, 49 U.S.C. § 11343 (1988), that the Waycross/Raceland shop consolidation was not authorized by the Commission and, hence, did not qualify for the immunity from "all . . . law" provided by the ICA. There is no merit to the Unions' contention that the immunity conferred on consolidating railroads removes only legal obstacles to the formal corporate and financial reorganization. There is no merit in the Unions' assertion that consolidating railroads must contend with the host of state and federal legal restraints that would prevent the very

[1] The Court of Appeals adopted its narrow interpretation of § 11341 (a) even though no party had even suggested that the ICA immunity provision would not encompass Railway Labor Act collective bargaining agreements or other contractual obligations impeding the implementation of an approved consolidation.

[2] Nor do Union Respondents attempt to defend the Court of Appeals' artificial distinction between the RLA and collective bargaining agreements arising thereunder.

operational changes that result in the economies and efficiencies found by the ICC to make the consolidation consistent with the public interest. *See infra* at pp. 6-10.

Third, the Union Respondents virtually ignore the comprehensive legislative history of the ICA immunity provisions set forth in CSXT's brief. In particular, Union Respondents ignore the instructive history of the Emergency Railroad Transportation Act of 1933 ("ERTA"), where Congress failed to except legal obstacles flowing from the Railway Labor Act and collective bargaining agreements from the permanent ICA immunity grant. The Unions also denigrate the significance of the Transportation Act of 1940, where Congress defeated the Harrington Amendment, which would have prevented the ICC from approving any consolidations that would have affected employee contract rights. *See infra* at pp. 10-14.

Finally, the Union Respondents do not dispute that it has been Congress' consistent purpose since the Transportation Act of 1920 to foster and encourage rail consolidations. *Brotherhood of Maint. of Way Employees* v. *United States*, 366 U.S. 169, 173 (1961); *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958); *United States* v. *Lowden*, 308 U.S. 225, 232 (1939). Nor do they dispute that subjecting rail carriers to the "interminable" bargaining provisions of the Railway Labor Act ("RLA") in order to remove contractual obstacles to consolidation would give rail unions a virtual veto over transactions found by the ICC to be in the public interest.

Instead, the Union Respondents rely on a classic "strawman" argument in an attempt to divert attention from the issue before the Court. They assert that Congress has not chosen to give the ICC "complete control" over day-to-day rail labor relations and that the Commission lacks "expertise" in such matters. These consolidated cases do not present any such issue. The sole issue before the Court is whether the immunity conferred by Congress in ICA § 11341(a) enables rail carriers to carry out approved consolidations notwithstanding legal obstacles flowing

from RLA collective bargaining agreements.[3]

Congress indeed has provided that the on-going, day-to-day relations between rail carriers and rail unions are to be governed by the RLA. However, since 1920 Congress' intent has been equally manifest that, in those instances when obligations arising under any "law", including the RLA and rail labor contracts, impede the implementation of an ICC-approved consolidation, the policies of the ICA must prevail. Congress has chosen that, in such instances, it is the ICA that is to be "the supreme law of the land". *Schwabacher,* 334 U.S. at 198. Union Respondents would have this Court ignore Congress' stated intent and elevate RLA obligations to a position of primacy. Their arguments, like the decision of the court below, are in error.[4]

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[3] Indeed, the Union Respondents acknowledge in their counter-statement of the Question Presented that the sole issue here is the proper scope of the immunity conferred on consolidating carriers by § 11341 (a). Union Resp. Brief at (i). Thus, as the Union Respondents recognize at page 18 of their brief, issues concerning the scope of the ICC's authority under ICA § 11347, 49 U.S.C. §11347 (1988), and its labor protective conditions, prescribed thereunder, are not before the Court.

Nor is the ICC's decision on remand from the D.C. Circuit (*CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 6 I.C.C. 2d 715 (1990)) before the Court, notwithstanding the Unions' extensive discussion of it at pp. 10-16 of their brief. In the remand decision, the Commission recognized that it was bound to comply with the mandate of the Court of Appeals. *See id.* at 720, 722, 745. However, the Commission noted that it has argued to this Court in the instant cases "that the Court of Appeals was in error . . . and that § 11341 does furnish a further basis for modification of CBAs . . ." *Id.* at 756 n.34. Furthermore, the Commission has agreed that, if this Court reverses the D.C. Circuit's interpretation of § 11341 (a), it will need to reconsider its remand decision. *CSX Corp.—Control—Chessie Sys. & Seaboard Cost Line Indus.*, Finance Docket No. 28905 (Sub-No. 22) (served July 20, 1990). *See* Petitioner's Supplemental Response to Motion to Dismiss in No. 89-1028 at 10a n. 9, filed on September 22, 1990.

[4] In the closing pages of their brief, Union Respondents raise Fifth Amendment concerns about the interpretation of § 11341 (a) espoused by Petitioners and the Federal Respondents. Their constitutional arguments, like their statutory ones, are without merit. *See infra* at pp. 18-19.

ARGUMENT

I. The Court of Appeals' Decision Is Contrary to Prior Decisions of this Court.

Over 40 years ago in *Schwabacher,* this Court declared in sweeping terms that Congress intended the ICA, as a result of its immunity provisions, to be "the supreme law of the land". 334 U.S. at 198. Accordingly, this Court ruled that the Commission, in determining the rights of a shareholder affected by a rail merger, was to look solely to the ICA itself, "not the promise that a charter made to him." *Id.* at 199. The Union Respondents seek to distinguish *Schwabacher* in a single footnote near the end of their brief. They argue that, because Congress granted the ICC "complete control" over rail carrier capital structures and not over rail labor relations, the immunity conferred from legal obstacles in contracts defining shareholder rights is somehow broader than the corresponding immunity from obligations in collective bargaining agreements. Union Resp. Brief at 43 n.57.

The immunity provisions in § 11341(a) permit no such distinction. That section broadly exempts consolidating carriers "from the antitrust laws and *from all other law,* including State and municipal law". Emphasis added. Congress did not limit the scope of the immunity to matters concerning carrier capital structures. Instead, Congress has broadly declared in § 11341(a) that "[t]he authority of the Interstate Commerce Commission under this subchapter [dealing with rail consolidations] *is exclusive.*" Emphasis added.[5] This Court's declaration in *Schwabacher* that Congress intended that statute to be "the supreme law of the land" (334 U.S. at 198) applies equally to the removal of all legal obstacles from whatever source that would impede approved rail consolidations.

This Court had earlier recognized in *United States* v. *Lowden,* 308 U.S. 225 (1939), that seniority rights flowing from rail collective bargaining agreements will inevitably be overridden

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[5] The immunity provisions in effect at the time of the *Schwabacher* decision, ICA § 5(11), similarly declared that "[t]he authority conferred by this section shall be exclusive and plenary". Pet. App. 119a. This Court observed in *Schwabacher,* "[T]he very fact . . . that the Commission's jurisdiction is 'plenary' and 'exclusive,' argues with equal force that federal law is also plenary and exclusive." 334 U.S. at 198.

in the implementation of an approved merger. The four justices who joined the concurring opinion in *BLE* similarly recognized the scope of the immunity conferred by the ICA.[6] The Court of Appeals' failure to follow these precedents led to its erroneous interpretation of § 11341(a).

II. The Plain Terms of § 11341(a) Immunize Rail Carriers from Obligations in Collective Bargaining Agreements that Impede an ICC-Approved Rail Consolidation.

The Union Respondents acknowledge that the language used by Congress is the clearest indication of its purpose. Union Resp. Brief at 24. Congress cannot have spoken more clearly when it drafted the ICA immunity provisions in 1920, when it reenacted those provisions in Title II of ERTA and in the Transportation Act of 1940, and when it recodified the ICA in 1978: consolidating carriers are exempt from compliance with all legal obstacles from any sources as necessary to the implementation of an approved transaction. *See* Pet. App. 118a-120a; CSXT Brief at 7a.

The Union Respondents do not contest the breadth of this language; they offer no alternative interpretation. They merely assert at pages 24 and 43 of their brief, without any logical basis, that § 11341(a) is, in effect, "an implied repeal statute" . Neither § 11341(a) nor its historic antecedents have *impliedly* repealed anything. For 70 years these sections have *expressly* immunized consolidating carriers from all legal obligations that would prevent the implementation of an ICC consolidation order.

Rather, Union Respondents seek to support the Court of Appeals' decision on a ground not relied on by the court below.[7] They suggest that the operational changes undertaken by

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[6] The Union Respondents ignore this aspect of *Lowden* and the *BLE* concurrence in their brief. But even ICC Commissioner Lamboley, on whose dissent in the remand proceedings in this case the Unions rely, has acknowledged that the *BLE* concurrence means that RLA provisions may be displaced in transactions subject to § 11341 (a). *See Rarus R.—Exemption*, 1989 ICC LEXIS 97, *32 n.20 (1989) (Lamboley, dissenting).

[7] The Court of Appeals did not question the ICC's express determination that CSXT's shop consolidation was a transaction "authorized by the Commission's approval in *CSX-Control*." *CSX Corp.–Control–Chessie Sys. & Seaboard Coast Line Indus.*, 4 I.C.C. 2d 641, 648 (1988); Pet. App. 42a.

Petitioners were not entitled to the immunity conferred by § 11341(a) because they are outside the Commission's "jurisdiction". The Unions argue that, once consolidating rail carriers have completed their formal corporate reorganizations (when they have "become one corporation or become the subsidiaries of a parent corporation"), they have exhausted the authority conferred on them by the ICC and are no longer entitled to immunity with respect to subsequent operational changes that are the "results" of such consolidations. Union Resp. Brief at 25-26.[8] As the Unions see it, the authority conferred on consolidating carriers by the ICC is "limited to the financial transactions specified in Section 11343(a)." *Id.* at 37-38.[9] This narrow interpretation of the scope of the "transaction" approved in a consolidation, merger, or control proceeding under ICA § 11343 is contrary to the language and purpose of the Act itself and is also contrary to consistent ICC precedent.

The Union Respondents' interpretation of the "transaction" subject to the immunity prescribed in § 11341(a) would have far-reaching implications that would be in inherent conflict with our nation's transportation policy "to facilitate merger and consolidation in the national transportation system." Under their argument, only the financial terms of a consolidation would be immunized from the restraints of all other laws. Any operational changes, including facility consolidations and service changes, even if found by the Commission to result in substantial public benefit, could be implemented, if at all, only after compliance with a myriad of federal, state, and local laws and ordinances. Congress' declaration in § 11341(a) that "[t]he authority of the Interstate Commerce Commission under this subchapter is exclusive" would be rendered a nullity.

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[8] Accordingly, the Unions assert that the transaction authorized by the Commission in *CSX—Control* "was consummated in 1980 when CSX exercised the authority granted and assumed control and management of the operation and properties of the two railroad systems." Union Resp. Brief at 2.

[9] Inconsistently, however, they maintain that employees who are affected by "resulting" operational changes are still entitled to the income protection benefits in the Commission's *New York Dock* Conditions. Union Resp. Brief at 26.

Section 11343 itself establishes that Commission approval of a consolidation "transaction" authorizes the carriers to engage in more than a mere "financial" reorganization. Section 11343(a)(1) requires Commission approval of the "consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties." Similarly, § 11343(b) refers to the acquisition of "control" as including "the power to exercise control or *management*" of a carrier "regardless of how that result is reached." Emphasis added.

Under § 11344(b)(1) the Commission must consider several factors in ascertaining whether the proposed consolidation is consistent with the public interest. Such analyses would be totally irrelevant if the "transaction" proposed by the carriers consisted solely of a change in corporate form. The Commission must consider the consolidation's effects on "the adequacy of transportation to the public" and on "competition among rail carriers in the region". § 11344(b)(1)(A), (E). A transfer of securities by itself will not have any effect on transportation services or carrier competitiveness.

Finally, and of greatest relevance here, the Commission must consider "the interest of carrier employees affected by the proposed transaction." § 11344(b)(1)(D). A mere reorganization of ownership will have no impact on employees. Employee interests are affected only by the consolidation of carrier facilities and the coordination of carrier operations that flow from the creation of a unified rail system, as this Court recognized over 50 years ago in *Lowden*, 308 U.S. at 233, when it upheld the Commission's authority to impose conditions protecting the income of affected employees:

> It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the Congressional policy of consolidation and of the efficient operation of the

> industry itself. . . .[10]

Accordingly, the Commission has repeatedly ruled that, in approving a § 11343 control application, it grants a carrier full authority to establish an operationally consolidated rail system. *See Seaboard Coast Line R.R.—Investigation of Control & Modification of Traffic Conditions*, 360 I.C.C. 582, 592 (1979); *Peoria & E. Ry. Stockholders* v. *New York Cent. R.R.*, 334 I.C.C. 131, 151 (1968). As the Commission explained most recently in *CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, Finance Docket No. 28905 (Sub-No. 23) (served Oct. 3, 1989), slip op. at 4 (emphasis added):

> We [have] rejected the argument that the immunity from the operation of other laws under section 11341(a) extends only to matters specifically mentioned by us in approving the transaction. Rather, the *immunity covers the future coordinations and public benefits expected to flow from the control transaction that we approved, and our approval of the principal transaction extends also to these directly related actions.*[11]

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[10] The Commission's regulations similarly reflect the breadth of the "transaction" that the Commission must scrutinize in a § 11343 consolidation proceeding. While applicant carriers are required to provide information about the financial aspects of their proposed arrangement, *see* 49 C.F.R. § 1180.9 (1989), they must also provide detailed analyses showing the impact of the proposed "transaction" on inter-and intramodal competition for freight surface transportation in affected regions (49 C.F.R. § 1180.7) and operational data including a summary of proposed operating plan changes. 49 C.F.R. § 1180.8. In addition, carriers are required to submit supporting information concerning the effect of the proposed "transaction" upon their employees during the initial three-year period after consolidation. 49 C.F.R. § 1180.6(a) (2) (v). None of these materials would have any relevance if the "transaction" under scrutiny consisted only of the carriers' financial arrangements.

[11] The Union Respondents note at pp. 3 of their brief that, at the time it filed its control application with the Commission, CSX Corporation filed several additional applications for permission to accomplish specified operational changes. The Unions imply that these separate applications were required because the control application only authorized the financial consolidation of the carriers. However, the ICA requires that carriers obtain additional express ICC approval to engage in certain types of operational changes (*e.g.*, joint use of tracks and line abandonments), even when done in connection with a consolidation. *See CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 363 I.C.C. 521, 535 (1980) ("To coordinate the operations of the two systems, applicants have proposed various operational changes. Some of these proposed changes require separate applications.").

Thus, the "transaction" before the Commission in *CSX—Control* involved far more than the mere conversion of Chessie and Seaboard common stock into CSX Corporation common stock. The Commission authorized the operational coordination of two rail systems (363 I.C.C. at 535), one that would have an overall beneficial impact upon transportation services (*id.* at 552) because of the "many projects intended to coordinate the Chessie and Family Lines systems to achieve the goal of overall profitability." *Id.* at 553. The Commission recognized that the applicant carriers "have the potential to generate significant cost reductions and improved utilization of physical assets" through various projects, including mechanical department coordinations. *Id.* at 556. In granting its approval, the Commission authorized the creation of a single rail "system." *Id.* at 533, 535.

CSXT's Waycross/Raceland shop consolidation clearly fell within the authority conferred in *CSX—Control*, as the Commission held below. The consolidation of these mechanical department shops is precisely the sort of operational change one would expect to flow from a carrier unification, as the carriers seek to eliminate redundant facilities and rid themselves of excess capacity, thereby achieving substantial operational efficiencies. Indeed, elimination of excess capacity at Raceland was presented by the carriers to the Commission as one of the benefits to be achieved by the consolidation in *CSX—Control*. *See* 363 I.C.C. at 561. Accordingly, this shop consolidation plainly fell within the § 11341(a) immunity conferred in *CSX—Control*.

III. The Legislative History of the ICA's Immunity Provisions Establishes that Congress Intended to Encompass Obligations Arising from Rail Collective Bargaining Agreements.

Congress' intent to immunize rail consolidations from obligations in collective bargaining agreements is further demonstrated by the ICA's legislative history. In particular, Congress did not adopt language that would have excluded such agreements and RLA bargaining obligations from the reach of the permanent ICA immunity provisions in Title II of ERTA. Congress did, however, at the same time expressly except such obligations from the immunity conferred in the temporary provisions of ERTA Title I. Congress' rejection of the Harrington Amendment in 1940 further shows its intent that obligations flowing from collective bargaining agreements not stand in the

way of the achievement of consolidations found to be in the public interest. Instead, Congress determined that rail employees affected by consolidations and mergers be provided with protection from income losses resulting from such transactions.

The Union Respondents do not dispute the breadth of the language used by Congress in enacting the ICA immunity provisions in the Transportation Act of 1920.[12] Nor, contrary to the court below, do they purport to find support for a limited construction of § 11341(a) in the enactment of the RLA in 1926. Instead, the Unions argue that the distinctions drawn by Congress in 1933 between the temporary and permanent provisions of ERTA should be disregarded because Congress had granted "broader jurisdiction" to the Federal Coordinator than it had the ICC with respect to rail consolidations. "The Coordinator's jurisdiction . . . ran to all matters which could permit railroads to operate more economically and he had explicit authority to *require* carriers to take certain actions." Union Resp. Brief at 38; emphasis added. In fact, however, the distinction they suggest is an erroneous one.

While Congress did vest greater authority in the Coordinator than the Commission to compel certain railroad actions, it did not grant the Coordinator any greater authority than the Commission over rail consolidations. In § 5 of ERTA, 48 Stat. 213, Congress authorized the Coordinator to issue binding orders to carriers to achieve the purposes specified in ERTA § 4(1).[13]

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[12] The Unions merely argue that, because Congress enacted general provisions dealing with rail labor relations in Title III of the 1920 Act, separate from the amendments to the ICA that were found in Title IV of the act, "it must be presumed that the ICC's exclusive authority over consolidations did not include jurisdiction over labor relations matters." Union Resp. Brief at 36. The correct interpretation is that Congress intended the newly established Labor Board to have jurisdiction with respect to rail labor matters generally but that rail carriers would be relieved of any such obligations "in so far as may be necessary to enable them to do anything authorized or required by any order" of the ICC. ICA § 5 (8), as added by § 407 of the Transportation Act of 1920, 41 Stat. 480; Pet. App. 118a.

[13] Thus, the Coordinator was empowered to order carriers to "avoid unnecessary duplication of services and facilities," to "permit the joint use of terminals," to "control allowances, accessorial services and the charges therefor," and to "avoid other wastes and preventable expense." ERTA §§ 4(1) (a)-(c), 5; 48 Stat. 212-13.

It did not grant similar authority to the Coordinator to order the "reorganization of carriers", the purpose set forth in ERTA § 4(2). *See also St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 317 (1954) (temporary provisions of ERTA, like the permanent ICA, contained no provision for "compulsory consolidation").[14] Accordingly, Congress' express exclusion of collective bargaining agreements and RLA obligations from the temporary immunity conferred on carriers complying with orders of the Coordinator in ERTA Title I, § 10(a), 48 Stat. 215 (Pet. App. 118a), stands in marked contrast to the absence of such an exclusion in the revised permanent immunity provisions of ICA § 5(15) governing rail consolidations, adopted in ERTA Title II, § 202, 48 Stat. 217-19 (Pet. App. 119a).[15] Had Congress intended the general ICA immunity accorded consolidating carriers to be so limited, it clearly knew how to make such an intention clear.

Union Respondents would similarly have this Court ignore Congress' rejection of the Harrington Amendment in 1940,[16] which, had it been adopted, would have prevented the ICC from approving any consolidation that would result in "the impairment of existing employment rights." 84 Cong. Rec. 9882 (1939). They argue that the amendment was not "rejected" but was merely "modified" and "incorporated as the second sentence of section 5(2)(f)." Union Resp. Brief at 39 n.55. This Court has already remarked on the significance of Congress' refusal to adopt the Harrington Amendment in *Railway Labor Exec's' Ass'n* v. *United States*, 339 U.S. 142, 151 (1950): "This amend-

[14] Although Congress enacted special protections for employees affected by Coordinator activities in Title I, § 7 (48 Stat. 213-14), it did not grant the Coordinator any broader jurisdiction than the Commission with respect to "labor relations matters", contrary to Union Respondents' unsupported assertion at page 38 of their brief.

[15] This Court similarly observed in *Texas* v. *United States*, 292 U.S. 522, 534 (1934), that the express protection given carrier contractual obligations with respect to the location of offices, shops, and roundhouses, located in ERTA Title I, § 11 (48 Stat. 215), stood in marked contrast to the absence of such a provision in the permanent ICA enactments in ERTA Title II and "indicate[s] an intentional distinction."

[16] The Union Respondents completely ignore the fact that Congress in 1940 did not adopt another proposal modelled after ERTA Title I that would have amended the ICA immunity provisions to except collective bargaining agreements and RLA obligations. *See* CSXT Brief at 43-44 & n.44.

ment . . . threatened to prevent all consolidations to which it related." If the RLA and collective bargaining agreements already prevented an impairment of employee rights, as the Union Respondents assert here, the Harrington Amendment would have been unnecessary. Congress rejected the proposal to preserve all "employment rights" of affected employees and instead granted them unparalleled statutory compensation protections. *Brotherhood of Maint. of Way Employees* v. *United States*, 366 U.S. 169, 177-78 (1961). At the same time Congress reenacted the broad immunity provisions of the ICA, then located in ICA § 5(11) (Pet. App. 119a-120a), without any exception for collective bargaining agreements or other RLA obligations so that rail consolidations found to be in the public interest could proceed.

Finally, the Unions purport to find support for their position in the amendments to the ICA contained in the 4R Act[17] and in the passage of the Staggers Rail Act of 1980.[18] Union Resp. Brief at 45-47. Neither act modified the ICA immunity provisions, and there is no legislative history to suggest that Congress intended any such result.[19] Indeed, both statutes had as their fundamental goal the fostering and encouragement of rail consolidations and related transactions. *See* S. Rep. No. 499, 94th Cong., 1st Sess. 20 (1975); *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Exec's' Ass'n*, 109 S. Ct. 2584, 2596-97 (1989). The amendments to the labor protection provisions of the ICA (then § 5(2)(f), now § 11347) contained in the 4R Act increased the income protections afforded affected employees (raising the period of income protection from four years to six) and codified the obligation of consolidating carriers to reach implementing agreements with the unions representing such employees in carrying out ICC-approved transactions. *See* Union Resp. Brief at 45-46. But nothing contained in those amendments limited the scope of the immunity provisions of the ICA.

[17] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31.

[18] Pub. L. No. 96-448, 94 Stat. 1895.

[19] The amendments to ICA § 5(2)(f) were last-minute additions to the 4R Act, without any legislative history. *Railway Labor Exec's' Ass'n* v. *United States*, 675 F.2d 1248, 1254-55 (D.C. Cir. 1982); *New York Dock Ry.* v. *United States*, 609 F.2d 83, 93 (2d Cir. 1979).

RLEA's claim that Congress intended in the 4R Act to provide that ICC-approved rail consolidations may be implemented only after compliance with the open-ended RLA bargaining procedures is completely unsupported by either precedent or logic. No court has accepted such an argument, and federal courts have continued to uphold the primacy of the ICA over the RLA in decisions since the 4R Act's passage. *Burlington N. R.R.* v. *United Transp. Union*, 848 F.2d 856, 863 (8th Cir.), *cert. denied*, 109 S. Ct. 499 (1988); *Brotherhood of Loc. Eng'rs* v. *Boston & Maine Corp.*, 788 F.2d 794, 800 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *see also ICC* v. *Brotherhood of Loc. Eng'rs*, 482 U.S. 270, 287 (1987) (Stevens, J., joined by Brennan, Marshall, and Blackmun, J.J., concurring). The Commission has also consistently rejected the notion that Congress intended any such result in the 4R Act. *See Denver & R. G. W. R.R.— Trackage Rights—Missouri Pac. R.R.—Between Pueblo, Co. and Kansas City, Mo.*, Finance Docket No. 30,000 (Sub-No. 18) (served Oct. 25, 1983), slip op. at 5 ("[T]he 4-R Act did not limit our authority to exempt a transaction from the RLA.")[20]; *St. Louis Southwestern Ry.—Trackage Rights*, 1 I.C.C. 2d 776, 781 (1984) ("The 4R Act did not limit our authority to preempt other laws in authorizing a transaction; it simply specified standards for the minimum level of employee protection . . . .").

In sum, the Unions' contention that Congress in the 4R Act intended *sub silentio* to elevate RLA rights to the primacy they claim is inherently incredible in view of Congress' expressed intent in 1976 to foster and encourage rail mergers. This argument, if true, would mean that Congress adopted without any discussion a provision virtually identical in effect to the Harrington Amendment that it had expressly rejected 36 years earlier – a provision, if it had been enacted, that would have "prevent[ed] all consolidations to which it related". *Railway Labor Exec's' Ass'n* v. *United States*, 339 U.S. 142, 151 (1950).[21]

Lacking any legislative history supporting their interpretation of the immunity provisions, the Union Respondents argue

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[20] *Vacated and remanded sub nom. Brotherhood of Loc. Eng'rs* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd*, 482 U.S. 270 (1987).

[21] Like the 4R Act, nothing in the Staggers Rail Act of 1980 even purported to effect the ICA immunity provisions.

that the ICC has not always consistently interpreted the reach of § 11341(a) and its predecessors and adopted its current interpretation only in 1983. Even if that argument were true, the language, legislative history, and policies underlying the ICA establish the correctness of the Commission's contemporary understanding.

In *Norfolk & W. Ry.—Merger*, 347 I.C.C. 506, 511-12 (1974), the Commission squarely articulated its authority to set aside agreements negotiated under the RLA. The Railway Labor Executives' Association ("RLEA") (represented by counsel for the Union Respondents here) argued that an RLA agreement could only be changed in accordance with the RLA's bargaining procedures and that the ICC lacked the authority to suspend its provisions. The Commission disagreed:

> . . . RLEA's assertion that the agreement and the wage, rules, and working conditions governed by the Railway Labor Act may not be changed except in accordance with the procedures prescribed by that act is squarely refuted by the language of section 5(11) of the Interstate Commerce Act which confers exclusive and plenary jurisdiction upon this Commission to approve mergers and relieves carriers from all other restraints of Federal law. The Railway Labor Act is a Federal act and is thereby preempted by section 5(11). Thus, the Commission may relieve the railroad from the requirements of that act insofar as is necessary to carry into effect the transaction approved pursuant to section 5(2).

More recent ICC decisions, following the passage of the 4R Act, have confirmed the Commission's interpretation of the reach of the ICA immunity language as it relates to the RLA and rail collective bargaining agreements. *See* p. 14, *supra; see also Delaware & Hudson Ry.—Lease and Trackage Rights Exemption*,

1989 ICC LEXIS 9, *8 (1989).[22]

Finally, Union Respondents argue at pages 27-28 of their brief that statements made by Graham Claytor in connection with the enactment of the Regional Rail Reorganization Act of 1973 ("3R Act") and the willingness of some railroads to enter into "lifetime" labor protection agreements, such as CSXT's Orange Book, demonstrate that the carriers must have understood that they could not obtain the right to transfer work and employees across corporate boundaries through consolidation proceedings under the ICA.

The Unions have presented absolutely no evidence to support their speculation. In fact, carrier support for generous labor protection provisions in the 3R Act was far more likely to have resulted from the fact that a substantial portion of the cost was to be paid by the U.S. Treasury.[23] In addition, virtually all of the employees entitled to the lifetime income benefits of the 3R Act already enjoyed lifetime protection from other sources. *Hearings on S. 2188 and H.R. 9142 Before the Surface Transportation Subcomm. of the Senate Comm. on Commerce*, 93d Cong., 1st Sess., 969 (1973) ("1973 Hearings"). Moreover, in exchange for the generous protective benefits, the 3R Act

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[22] In addition, the Commission has long declared that it has the authority under the immunity provisions to set aside non-labor contract terms where necessary to carry out a rail consolidation. *See Missouri Pac. R.R.—Merger*, 348 I.C.C. 414, 430 (1976), *rev'd sub nom. City of Palestine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

Union Respondents cite the Commission's decision in *Gulf, M. & O. R.R.—Abandonment*, 282 I.C.C. 311 (1952), for the proposition that the Commission has held that the ICA immunity provisions are "not applicable to private contracts." Union Resp. Brief at 21 n.37. In fact, however, as CSXT demonstrated at pages 28-29 n.32 of its brief, the Commission in *Gulf* expressly recognized that it does have the power to abrogate contract terms in a transaction, unlike that before it, to which the immunity provisions now found in § 11341(a) are applicable. *See* 282 I.C.C. at 335.

[23] *See* 1973 U.S. Code Cong. & Admin. News 1146; *see also id.* at 3295 (letter from Secretary of Transportation commenting on employee protection provisions of the labor/management agreement that underlay the 3R Act: "Using the taxpayers' money, they have negotiated some unprecedented provisions which do not assure the new system of labor costs that will permit it to survive, but which do impose an excessive burden on the taxpayer.").

authorized Conrail to move work *anywhere* within its system, including between points within a single predecessor railroad, and not merely to locations across former corporate boundaries. Thus, Conrail obtained the right to move work and employees without having to establish that such actions were part of the creation of the consolidated system, as would be the case in an ICC consolidation.[24]

Finally, the carriers' willingness to pay rail labor's "price" was essential to remove labor objections to the proposed legislation. 1973 Hearings at 969 (Claytor testimony).[25]

Accordingly, the legislative history of the ICA demonstrates Congress' intent to include collective bargaining agreement obligations within the reach of the § 11341(a) immunity provisions.

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[24] *See* 3R Act § 503, reprinted in 1973 U.S. Code Cong. & Admin. News 1138; Conf. Rep. No. 93-744, reprinted in 1973 U.S. Code Cong. & Admin. News 3335; emphasis added:

> The Corporation was granted the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on rail properties conveyed to it from a railroad in reorganization *to any location, facility, or position on its system*. . . .

[25] Similar considerations led CSXT's predecessors to agree to lifetime income protections in the Orange Book agreement. The Orange Book was entered into by the carriers in order to settle rail labor's involvement in lengthy litigation challenging the Commission's approval of the consolidation of the Atlantic Coast Line and Seaboard Air Line Railroads. *See Florida E. C. Ry.* v. *United States*, 259 F. Supp. 993 (M.D. Fla. 1966), *appeal of RLEA dism'd as moot*, 386 U.S. 544 (1967). Thus, rail labor was able to obtain the Orange Book protections not because the carriers had any doubts concerning the Commission's power to immunize the transaction from the RLA, but because the unions had succeeded in delaying the consolidation through post-ICC court proceedings. In addition, the carriers, like Conrail, also obtained in the Orange Book the valuable right to move work and employees not only across previous corporate boundaries but also anywhere within each of the formerly separate ACL and SAL rail systems. It should be noted that the Waycross/Raceland coordination does not threaten or seek to abrogate the lifetime income protections bestowed by the Orange Book.

IV. ICC's Interpretation of the Scope of the ICA Immunity Provisions Does Not Result in a Fifth Amendment Violation.

Union Respondents suggestion at pp. 47-50 of their brief that Petitioner's interpretation of § 11341(a) would result in a violation of the Fifth Amendment also has no merit.[26] It is not disputed that contract rights may in certain instances be entitled to Fifth Amendment protections. But this Court has long ruled that private contracts that deal with a subject matter appropriately regulated by the federal government under the commerce power may be nullified without violating the Fifth Amendment. *See, e.g., Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-28 (1986); *Norman* v. *Baltimore & O. R.R.*, 294 U.S. 240, 307-11 (1935); *Louisville & N. R.R.* v. *Mottley*, 219 U.S. 467, 482 (1911). Congress plainly may nullify a contractual provision by adjusting the benefits and burdens of economic life to promote the common good without requiring government compensation. *Connolly*, 475 U.S. at 224-25.[27]

The federal courts have routinely rejected Fifth Amendment claims by rail labor and employers alike based on the alleged impact of federal legislation on collective bargaining agreements and labor protection agreements. *See Wilson* v. *New*, 243 U.S. 332, 353 (1917); *Railway Labor Exec's' Ass'n* v. *United States*, 575 F. Supp. 1554, 1558-59 (Sp. Ct. RRRA 1983), *cert. denied*, 465 U.S. 1101 (1984); *United Transp. Union* v. *Consolidated Rail Corp.*, 535 F. Supp. 697, 706-08 (Sp. Ct. RRRA) (Friendly, J.), *cert. denied*, 457 U.S. 1133 (1982). *Cf. Chang* v. *United States*, 859 F.2d 893, 894-98 (Fed. Cir. 1988) (invalidation of private

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[26] This issue was not reached or decided by the Court of Appeals. Pet. App. 26a.

[27] The Unions purport to see a distinction between Congress' power to make a contract "unenforceable" and its authority to "relieve" one party of a contractual obligation. Union Resp. Brief at 48. They cite no supporting authority. The effect of the ICA in this case, in relieving CSXT from certain contractual obligations to its employees, is no different from the ICA's nullification of the lifetime pass rights of Erasmus L. Mottley and his wife, upheld by this Court 80 years ago in *Louisville & N. R.R., supra*.

employment contracts by executive orders did not constitute a taking).[28] The alleged infringement of BRC's members' contract rights by the ICC, in furtherance of a rail consolidation found to be in the public interest, is similarly not of constitutional magnitude.[29]

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[28] Union Respondents cite *Central New England Ry.* v. *Boston & Albany R.R.*, 279 U.S. 415 (1929), at page 50 of their brief for the proposition that the ICA "has never been read" to have a destructive effect on a third party's contract rights. *Central New England* did not so hold; indeed, the Court expressly declined to reach this issue. *See* 279 U.S. at 419-20. But, the Court did cite approvingly its prior decisions in *Colorado* v. *United States*, 271 U.S. 153 (1926), and *New York* v. *United States*, 257 U.S. 591 (1922), discussed in CSXT's brief at 17 n.22. In each of those cases, the Court saw no constitutional infirmity in overriding provisions in state rail charters as necessary to carry out ICC orders. *See* 271 U.S. at 165; 257 U.S. at 601.

Regents of the Univ. Sys. of Ga. v. *Carroll*, 338 U.S. 586 (1950), cited at page 49 n.61 of the Unions' brief, deals with the statutory authority of the FCC and, hence, is wholly irrelevant here.

[29] Any interference with BRC's members' contract rights is *de minimis* at best. The only effect of the Commission's decision on Orange Book agreement rights is that employees protected thereunder, who could already be reassigned by CSXT anywhere on the expansive SCL system, can now be reassigned to *one* additional location, Raceland, Kentucky, with their moving and other related home removal losses paid under Art. I, §§ 9 and 12 of the ICC's *New York Dock* Conditions. None of the remaining portions of the Orange Book, including its lifetime income protections, was affected. The *de minimis* impact on BRC's alleged contract rights is more than justly compensated by the generous income protections and moving cost and home sale loss reimbursement provisions in the Commission's *New York Dock* Conditions.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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